

REFERENDUM IN THE UNITED KINGDOM  
TO LEAVE THE EUROPEAN UNION

# What happens next? Legal Consequences of Brexit

*EURO-CEFG Brief*

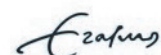
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## REFERENDUM IN THE UNITED KINGDOM

# What happens next? Legal Consequences of Brexit

*EURO-CEFG COMMENTARY*

The much anticipated 'Brexit' referendum took place yesterday after months of dominating newspaper headlines, political debates, and the public's (and Brussels') attention. As is well-known by now, the referendum on the UK's membership of the EU was the result of David Cameron's pledge in the run-up to the 2015 general elections. Cameron's pledge was that he would renegotiate the position of the UK prior to holding a referendum, with a view to achieving a number of reforms. After the re-election of the Conservative party, Parliament passed legislation allowing for the referendum before the end of 2017 (European Union Referendum Act 2015). Subsequently, the UK government engaged in negotiations with their EU counterparts. The basis of the negotiations was Cameron's proposed reforms, which were sent to the European Council president, Donald Tusk, in November 2015. The end product of the negotiations is set out in the ['New Settlement for the United Kingdom within the European Union'](#), a series of documents outlining agreements reached in the areas of economic governance, competitiveness, sovereignty, and free movement. According to the Prime Minister, the settlement secured all of the UK's objectives, ensuring 'the best of both worlds' for Britain. According to the Leave camp, 'the Prime Minister's hollow deal comes nowhere near the fundamental reform he promised before the election.'

In this brief contribution, we seek to discuss 'the day after' the 'Brexit' referendum with a focus on the legal consequences of the 'Brexit'. Before engaging with this discussion, we should take a moment to briefly consider the legal and political meaning of the referendum.

### WHAT IS THE LEGAL AND POLITICAL MEANING OF THE REFERENDUM?

From a legal point of view, the status of the referendum is clear: the referendum outcome is advisory and legally non-binding. Simply put, Parliament is sovereign, and cannot be bound; therefore technically it can defy the referendum result with a majority vote. Given that there was no minimum turnover required for the referendum to be valid, the final outcome was determined solely by the majority of votes. The vote resembles the 2014 Scottish independence referendum and the 1975 referendum on the UK's membership of the Common Market, but contrasts with the 2011 referendum on electoral reform which would have obliged the government to legislate if that was dictated by the votes.

Although the referendum is legally toothless, the importance of the vote lies in its political follow-up. Research on national experiences with referendums indicates that the attitude of representative bodies to such referendums may directly impact national parties' electoral performance. Amidst the heightened attention placed in the past year on the re-negotiation of the UK's relationships with the EU, as well as on the referendum itself, arguably there is minimal chance that the UK government will act in defiance of 'the will of the people'. In the past, Cameron declared that 'a vote to leave is a vote to leave', indicating that he would follow the outcome of the referendum. Downing Street also dismissed the idea of a second referendum proposed by the Leave camp as leverage for further renegotiations with the EU.

Yet, as the political and legal background to the Brexit reveals, the situation is more complex than the Prime Minister's statement suggests. By virtue of the non-binding nature of the referendum, it will be up to Parliament to vote legislation determining both the way in which Britain will exit the EU, and the terms on which it does so. A number of questions arise in this respect. Will David Cameron resign as prime minister? How will his successor

envisage legislation to exit the EU? How will the 'Leave' camp contribute to the proposed legislation, given that they do not yet have a specific plan for Britain's post-Brexit relationship with the EU? One of the most pertinent questions is whether a potential proposal to exit the Single Market would find support in the House of Commons which, at the moment of writing, does not contain a clear majority in favour of such a withdrawal.<sup>1</sup>

At this point we should note that the way in which UK's exit from the EU will take place is a different matter from the details of the exit arrangements. The former matter seems more straightforward than the latter, since Article 50 TEU provides the legal framework for a Member State's withdrawal from the EU. Yet Article 50 TEU is unclear as to whether arrangements for the UK's future relationship with the EU would be addressed in the withdrawal agreement itself or in a subsequent agreement. In this respect, Article 50(2) only refers to 'taking into account of the framework for [the Member State's] future relationship with the Union.' Moreover, contrary to the argument that invoking Article 50 could lead to further renegotiations with the EU without necessitating a Brexit, it is questionable whether, legally speaking, Article 50 TEU can be used for that purpose of whether its purpose is clearly to trigger a Member State's departure from the EU.<sup>2</sup> It is also highly doubtful that the two-year timeframe provided in Article 50 (subject to extension on the basis of unanimity in the Council) is sufficient to settle all the details of a post-exit agreement.

In addition, although a range of alternatives has been suggested for Britain's post-exit arrangements, there is currently no consensus on what would be the best available option. Given its unprecedented nature, the issue of Treaty withdrawal remains largely uncharted territory. We will subsequently briefly describe the process of withdrawal under Article 50 TEU before commenting on the meaning of the referendum's outcome for the area of economic governance. It should be noted from the outset that the 'New Settlement' concluded between the UK and the European Council on 19 February 2015 ceased to exist by virtue of the referendum vote to leave the EU.

## WITHDRAWAL FROM THE EU

As mentioned above, the procedure for the withdrawal of a Member State from the EU is set out in Article 50 TEU. Even though theoretically the UK can also withdraw from the EU without reference to Article 50 (e.g. by repealing the European Communities Act 1972), by doing so it would risk breaching its obligations under international law; the Vienna Convention on the Law of Treaties needs to be read in light of the EU Treaties. Such a unilateral withdrawal might also damage Britain's image and credibility as an international negotiator.

The first step in the process under Article 50 TEU is a notification of the UK's intention to withdraw, sent by the Prime Minister to the European Council. This notification will signal two things: first, the beginning of the withdrawal negotiations between the UK and the EU (Article 50(2) and (4) TEU) and, second, the countdown to the two year deadline in which the Treaties will automatically cease to apply to the UK (Article 50(3) TEU), unless the remaining Member States (voting unanimously) agree to extend that time limit.<sup>3</sup> In other words, upon the expiry of the two years, and provided that an agreement has not been found by then, the UK will automatically cease to be an EU Member State unless the remaining Member States agree to an extension. Indeed, it remains open to the UK government to decide when to give formal notice, yet it cannot be said with certainty how long after the referendum this might take place.

With regard to the negotiations, the agreement will be negotiated as an international agreement under Article 218(3) TFEU and in accordance with guidelines provided by the European Council voting in unanimity. In light of the European Council's guidelines, the Council, deciding based on qualified majority voting, has to authorise the opening of the negotiations and give the negotiating mandate to the Commission. The parties to the negotiation would be the EU and the UK. As such, the UK would be treated as a non-EU State and thus will not participate in

<sup>1</sup> <https://next.ft.com/content/f015a0f5-e5fc-3f42-a6c6-990d0a3527de>

<sup>2</sup> <http://eulawanalysis.blogspot.nl/2014/12/article-50-teu-uses-and-abuses-of.html>; <http://blogs.ft.com/david-allen-green/2016/06/14/can-the-united-kingdom-government-legally-disregard-a-vote-for-brexit/?siteedition=uk>

<sup>3</sup> House of Lords Withdrawal Process Study: [www.publications.parliament.uk/pa/ld201516/ldselect/lducom/138/138.pdf](http://www.publications.parliament.uk/pa/ld201516/ldselect/lducom/138/138.pdf)

the relevant discussions of the European Council or the Council (Article 50(4) TEU). The final stage of the negotiations requires the consent of the European Parliament (by simple majority voting), and the signing of the agreement by the Council (by enhanced qualified majority voting, meaning 20 out of the 27 Member States, representing 65% of the EU population). In the period between the notification and the withdrawal agreement, the UK would remain a Member State, yet it is likely that its influence and position in decision-making would be severely affected.

Even though the form of the withdrawal agreement remains unclear for now, one of its objectives could be to pave the way for the new EU-UK relationship. In this sense, the withdrawal agreement and the post-exit arrangements would be intertwined. A notable difference between the agreement under Article 50 and a second agreement, on the post-exit arrangements, concerns the voting requirements for each. In particular, if the agreement on a future UK-EU relationship takes the form of a mixed agreement or an association agreement, its conclusion would require consensus among the 28 Member States and a national ratification of the final agreement.

As mentioned above, if a withdrawal does not take place within two years, or if the European Council does not agree an extension before the expiry of the two year timeframe, the withdrawing State will cease to be a Member State. In this case, the UK would most likely fall back on WTO rules for market access and its trade relations. Apart from the range of tariffs that would be applied to UK's exporting and importing goods, it is also likely that the country's commitments with other WTO members would need to be re-considered and re-adjusted to the new status of the country.<sup>4</sup>

Beyond the negotiation of the post-exit arrangements at the EU level, UK Government would also need to enact new legislation or repeal old legislation depending on which EU-derived UK laws it will choose to keep. The European Communities Act 1972 would, of course, need to be repealed. A relevant point here is that the devolved legislatures (Scotland, Wales, Northern Ireland) would also have to deal with the EU legislation that was transposed into their laws. It goes without saying that the process of disentangling domestic legislation from EU-transposed legislation would be a prolonged and challenging process.

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<sup>4</sup> [www.publications.parliament.uk/pa/ld201516/ldselect/lddeucom/138/138.pdf](http://www.publications.parliament.uk/pa/ld201516/ldselect/lddeucom/138/138.pdf)

## EURO-CEFG

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The European Research Centre for Economic and Financial Governance (EURO-CEFG) is a joint research initiative initiated by researchers from the Leiden University, Delft University of Technology and Erasmus University Rotterdam.

It aims at building a trans-European network of high-quality researchers and societal stakeholders around the interdisciplinary theme of Economic and Financial Governance in the EU.

EURO-CEFG facilitates scientific cooperation of researchers and research groups with different disciplinary backgrounds and with expertise in the different areas linked to economic, monetary and financial (market) governance.

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